Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *AS v Canada Employment Insurance Commission*, 2020 SST 1129

Tribunal File Number: GE-19-3804

BETWEEN:

A. S.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: February 20, 2020

DATE OF DECISION: February 24, 2020

Canada

DECISION

[1] The appeal is allowed. The Commission failed to prove that the Claimant voluntarily left her employment. The Commission also failed to prove that she lost her employment due to misconduct. This means that the Claimant is not subject to a retroactive disqualification from Employment Insurance (EI) benefits, for these reasons.

[2] Further, the Commission failed to prove that the Claimant made a false statement or misrepresentation knowingly.

OVERVIEW

[3] The Claimant submitted an application for regular EI benefits on January 2, 2013. In her application, she indicates that she is no longer working for X due to a shortage of work. A benefit period was established effective December 16, 2012. After serving a two-week waiting period, the Claimant collected 39 weeks of EI benefits, ending on October 26, 2013.

[4] The Commission conducted a review of her claims and determined that the Claimant was not entitled to the benefits she collected. The Commission informed the Claimant that they determined that she had voluntarily left her employment with X, without just cause. They also determined that the Claimant had knowingly made a false representation on her application for benefits. The Commission imposed a retroactive disqualification effective December 16, 2012, which is the start date of her benefit period. This disqualification resulted in a $15,405.00 overpayment.

[5] The Commission maintained their decision upon reconsideration. The Claimant appealed to the Social Security Tribunal (SST) General Division on May 30, 2016. She states that she did not voluntarily leave her job with X and requests that the SST contact her witness. The General Division rendered their decision on December 12, 2016. I refer to this decision as the first GD decision.

[6] The Claimant appealed the first GD decision to the SST Appeal Division (AD). The AD rendered their decision on October 31, 2019. The AD returned the matter to the General Division

for a “new hearing.” Further, the AD directed the General Division to hold a pre-hearing conference to provide information to the parties to uphold the principles of procedural fairness.

[7] I conducted the pre-hearing teleconference on December 19, 2019. The Claimant, her representative, and the interpreter were present. I outlined the issues under appeal, the legal tests, and the hearing process. I explained that I am not bound by the first GD decision or any findings of fact listed in that decision. This is because the AD returned the matter for a new hearing. I then informed the Claimant and her representative that their witnesses may attend the teleconference hearing to present oral evidence. They can call into the teleconference from any location. The SST does not investigate or try to obtain witness statements on her behalf. I also explained that their witnesses may submit their evidence in the form of a signed, written statement if they are unable to attend the teleconference.

[8] During the new teleconference hearing, the representative stated that the Claimant is the only witness present who will be presenting evidence. He confirmed that no other witnesses would be presenting evidence on behalf of the Claimant.

[9] I have considered all documentary evidence contained in the appeal file as well as the Claimant’s oral evidence when rendering my decision. My reasons for this decision follow.

ISSUES

[10] How did the Claimant’s employment end? Did she voluntarily leave or did she lose her employment?

[11] If the Claimant lost her employment, was the loss of employment due to misconduct?

[12] Did the Claimant provide false or misleading information? If so, did she provide it knowingly?

[13] Do I have jurisdiction to determine the Claimant’s hours of insurable employment?

[14] Do I have jurisdiction to determine issues relating to the Claimant’s benefit rate?

ANALYSIS

[15] When making my decision, I have considered that Parliament linked voluntary leaving and misconduct under sections 29 and 30 of the *Employment Insurance Act* (*Act*). Therefore, if I interpret the facts in a slightly different manner, to conclude that the case is one of a loss of employment instead of one of voluntary leaving, as determined by the Commission, I am not straying from the subject matter I must determine. In this case, what I must determine is whether the Claimant is subject to a disqualification under sections 29 and 30 of the *Act*.[1]

Voluntary leaving or loss of employment

[16] The law states that when determining whether a claimant has voluntarily left her employment, the question to ask is, "did the claimant have the choice to stay or to leave?"[2]

[17] The Commission has the burden to prove the Claimant voluntarily left. I use the term "burden" to describe which party must provide sufficient proof of their position to overcome the legal test. The burden of proof is a balance of probabilities, which means that the facts or events are more likely than not to have occurred as described.

[18] The Commission determined that the Claimant voluntarily left her job with X The Claimant disputes this and states that her employment with X ended when her onsite supervisor told her on December 16, 2012, that she is "fired."

[19] The Commission submits that the employer clearly indicates that there was work available to the Claimant and she failed to show up for work. The Commission relies on the employer's written response to their request for payroll information and the Record of Employment (ROE).

[20] Based on the documents submitted into evidence, X issued the ROE on January 8, 2013, listing the reason for separation as "E" for quit. The ROE states the last day paid is September 6, 2012. The employer's director, A.D., signed the request for payroll information form on August 7, 2013. The employer states on this form that they had work available and scheduled the

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[1] *Canada (Attorney General) v. Easson,* A-1598-92
[2] *Canada (Attorney General) v Peace,* 2004 FCA 56

Claimant, but she never "showed up to work." There is no evidence that the Commission spoke directly with the employer to test this evidence, even after receiving conflicting information from the Claimant during the reconsideration process.

[21] Further, there is no evidence that the Commission spoke directly with the Claimant until May 20, 2016. During this conversation, the Claimant states that her supervisor told her not to come into work and they never called her to come back. The Commission ends this conversation stating they will determine whether they will contact the employer.

[22] There is no evidence that the Commission spoke directly with the employer to clarify the conflicting evidence. Rather, the Commission simply issued an Investigation Information Sheet on May 20, 2016. This document states that the investigator "deemed" that the Claimant had voluntarily left her employment. As pointed out by the representative during the hearing, the investigator lists the word, "Other," as the name of the person providing the information for this Investigation Information Sheet. This indicates to me that the Commission relied on the information on the ROE and the payroll information sheet when determining the Claimant voluntarily left her employment.

[23] I favoured the Claimant's evidence that she did not voluntarily leave her employment because the Claimant's evidence is consistent and probable given the circumstances presented to me. The Claimant explained in detail how her employer, X was a farm labour employment company. She says that X held contracts with various farms and provided labourers to complete the farm work. X employed the Claimant, assigning her to work at X where she picked and packaged cucumbers.

[24] The Claimant states that her employment contract included her wage and transportation to and from the farm, where her employer scheduled her to work, in exchange for her labour. She explained that the employer had a 15-seat minivan that would pick her up at her home around 5:30 a.m. every workday. She states that the employer picked her up from her home and would pick up other workers before driving them to the farm where they were to work. Then, the employer would take her and her co-workers back to their respective homes when their workday ended, after 3:30 p.m.

[25] The Claimant states that although she worked for X, their owners and managers were not at the farms when she was working. She states that while she was working on the farms she reported to supervisors employed by the farm.

[26] I believe the Claimant when she states that on September 6, 2012, her supervisor at X told her she was "fired." She says that he said this to her in English and then asked another worker to translate it into Punjabi for her so she understood she would no longer be coming to work at that farm. She states that this supervisor did not work for X.

[27] The Claimant has consistently stated that after she returned home on September 6, 2012, she called X and spoke with the owner's wife. She says the owner's wife told her that she no longer worked with them because she was fired. She says they also told her that the bus (minivan) would not be picking her up for work anymore. She testified that X's minivan never came to her house after September 6, 2012. She states this is another indication that she was no longer working for this employer.

[28] The Claimant states that her employer was hiring labourers through the foreign worker program. She says that the employer could not say there was a shortage of work for fear that it would negatively affect their funding from the foreign worker program. Further, she says that someone told her that it was the end of the season for picking cucumbers. I find that both reasons are probable given the nature of the Claimant's employment with X.

[29] Based on the evidence, as set out above, I find that the Claimant did not voluntarily leave her employment. This is because she did not have the choice to remain employed. Rather, her ability to remain employed was entirely dependent on her employer assigning her to work on a farm and providing her transportation to and from the work location. Her employer failed to provide her with a job assignment and transportation after September 6, 2012. Therefore, I find the Claimant lost her employment and did not voluntarily leave.

Loss of employment

[30] In cases where a claimant loses their employment, the Commission bears the burden of proving that the loss of employment was due to the claimant's misconduct. As stated above, the burden of proof is on a balance of probabilities.

[31] I do not have to determine whether the dismissal was justified. My role is solely to determine whether the Claimant committed the action the employer accused her of and whether those actions amount to misconduct within the meaning of the *Act*.[3]

Misconduct

[32] As set out above, I find that the Claimant lost her employment on September 6, 2012, when her supervisor told her not to return to work. The Claimant has consistently stated that neither her supervisor, nor her employer, told her the reason why her employment ended, other than to say she was "fired."

[33] The Commission has presented insufficient evidence to prove that the loss of employment related to the Claimant's actions or conduct. Rather, I find that the evidence supports a finding that the employer simply determined that the services of the Claimant were no longer required or were no longer suitable for their business needs. This means that the Claimant did not lose her employment due to her own actions or conduct. Therefore, I find that the Commission has failed to prove the loss of employment was due to misconduct. This means the Claimant is not subject to a retroactive disqualification for this reason.[4]

False or misleading information knowingly provided

[34] The Claimant consistently states that her employer fired her from X. However, based on the copy of her application for benefits in evidence, she selected "shortage of work" in answer to the question, "Why are you no longer working?" This was her answer relating to her employment with X. So, I find the Claimant's answer is considered false or misleading information because she selected shortage of work instead of dismissal. I will now determine whether the Commission has proven that the Claimant provided this misleading or false information, "knowingly."

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[3] *Canada (Attorney General) v Marion*, 2002 FCA 185
[4] Sections 29 and 30 of the *Act*

[35] The law states that if it is clear from the evidence that the questions were simple and the Claimant answered incorrectly, then I can infer that the Claimant knew the information was false or misleading.[5]

[36] The Claimant states that she came to Canada in January 2012. She confirmed that English is her second language. She says that her English was limited when she was working for X in 2012 and applying for EI benefits on January 2, 2013.

[37] Upon further review of the Claimant's application for benefits, I note that she indicates that she did not have assistance with completing her application. Further, I note that the options provided to answer the question, "Why are you no longer working" do not include the word "fired." Instead, the options include in part, "shortage of work", "quit", "dismissed or suspended."

[38] In this case, I find that the Claimant's application form did not provide simple or clear options for her to select the correct answer. This is because English is her second language and the options provided did not include the word "fired." Therefore, the options provided on the application were not clear and simple. So, I find the Claimant did not provide false or misleading information, "knowingly."

Total insurable hours

[39] The Commission made additional submissions to the Tribunal on December 23, 2019. These submissions include copies of two ROEs issued by employers and two interim ROEs created by the Commission. The Commission states they considered these four ROEs when establishing the Claimant's benefit period.

[40] The Claimant states that the Commission failed to include 99 hours of her insurable employment when determining her benefit entitlement. She points to one pay stub listing 96 hours of employment for the pay period ending September 29, 2012. She states that these hours were not included in the Commission's calculation.

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[5] *Nangle v Canada (Attorney General)*, 2003 FCA 210.

[41] I recognize that the Claimant submitted copies of pay stubs and picking cards with her second request for reconsideration. Specifically, one pay stub lists a pay period ending September 29, 2012, and 96 hours, not 99 hours. However, this pay stub does not list the start date of this pay period or the last day the Claimant worked during this pay period. Further, this pay stub does not list the employer's name. Therefore, I find there is insufficient evidence to prove the Commission failed to consider these 96 hours in their calculation or creation of the interim ROEs.

[42] Further, the law states that Canada Revenue Agency (CRA) has exclusive jurisdiction to determine the number of insured hours a person has in insurable employment.[6] If the Claimant wishes to pursue this issue, she is at liberty to contact CRA and request an insurability ruling.

Benefit Rate

[43] The Claimant made written submissions to the Tribunal under the heading "Non-Permissible Reduction Benefit Rate." These submissions do not speak to her benefit rate or its calculation. Rather, these submissions state incorrect information relating to insurable hours and weeks of benefits.

[44] Specifically, her submissions state that the Claimant has 1110 hours of insurable employment from December 14, 2011, to December 15, 2012. The Commission provided copies of the four ROEs used to establish this benefit period. These ROEs list a total of 1692 hours of insurable employment that fall within her qualifying period from December 18, 2011, to December 15, 2012.

[45] The Claimant's submissions also state that she is entitled to 21 weeks of regular EI benefits and she only received 20 weeks. However, the Claimant provided conflicting evidence that included a copy of a printout from her "My Service Canada Account." This printout lists 39

[6] Section 90.1 of the Act; *Canada (Attorney General) v Romano* 2008 FCA 117; *Canada (Attorney General) v Didiodato* 2002 FCA 345

weeks of benefits paid to her from December 30, 2012, to October 26, 2013. I note that the printout lists payments for bi-weekly payments, which are two-week periods.

[46] The Commission provided a copy of their Supplementary Record of Claim as evidence of their May 20, 2016, conversation with the Claimant. The Commission documents that, during this conversation, the Claimant states she is not disputing the reduction in her benefit rate. This indicates to me that the Commission did not render a reconsideration decision relating to the Claimant's benefit rate. Nor is there evidence before me that the Commission did render a reconsideration decision regarding the Claimant's benefit rate.

[47] As explained during the hearing, I do not have jurisdiction to determine issues that the Commission has not reconsidered under section 112 of the *Act*. Therefore, in the presence of the inaccurate information, as set out above, and the fact the benefit rate was not the subject of the Commission's reconsideration decision, I declined to hear the issue relating to the Claimant's benefit rate, for want of jurisdiction.

CONCLUSION

[48] The appeal is allowed.

[49] Regarding the disentitlement, the Claimant did not voluntarily leave her employment. She lost her employment for reasons other than misconduct. This means she is not subject to a retroactive disentitlement, for this reason.

[50] The Commission failed to prove that the Claimant provided false or misleading information, "knowingly."

[51] Regarding the Claimant's benefit rate, I declined to hear this issue for want of jurisdiction.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	February 20, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. S., Appellant (Claimant) Ben Thind, Representative for the Appellant (Claimant) Mr. E. Rana, Interpreter